No. 80-1526

Office-Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1980

VICTOR D'ARC,
Petitioner,

-vs-

MARY LEA J. D'ARC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. As the state courts did not apply a "preferred suitor" doctrine favoring either wife or husband but merely declined enforcement of an agreement between husband and wife on a specific finding that enforcement would be "unfair, unjust and inequitable" in the circumstances, which included lack of independent advice or legal counsel of any kind, does the determination below create any question under the equal protection clause of the Fourteenth Amendment of the United States Constitution or Article 1, Section 10, of the United States Constitution prohibiting laws impairing the obligation of contract?

2. Does New Jersey's equitable distribution of marital assets offend the due process clause of the Fourteenth Amendment to the United States Constitution where it is applied to a residence purchased by the wife prior to marriage, placed in her future husband's name and then occupied by both parties during a marriage which terminated by separation followed by the husband's unsuccessful attempt to assassinate his spouse?

3. Does the admission of evidence in a civil proceeding of telephone conversations authenticated in part by hearsay evidence of its recording by one of the parties to the conversations violate the provisions of 18 U.S.C. Secs. 2510-2520 or create any constitutional issue?

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STATEMENT OF CASE

The parties in this matrimonial proceeding, both in their early fifties, married on June 15, 1972, and separated on February 22, 1976.[1] It was a second marriage for each. Dr. Victor D'Arc, the plaintiff, was the father of two teenage daughters, and Mary Lea Johnson D'Arc, hereafter Mary Lea Johnson, is the mother of six children by a prior marriage.

Dr. D'Arc, a psychiatrist, engaged in a private practice in New York prior to the marriage with an income reported by him at approximately $50,000 annually. After the marriage, he gradually abandoned his practice and the parties devoted themselves to the expenditure of Ms. Johnson's substantial funds. Throughout the marriage and, indeed, for a year prior thereto when the parties lived together, Dr. D'Arc was sup-

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1 The facts are well summarized in the trial court opinion. Little elaboration is required. See Pa. 36 et seq.; D'Arc v. D'Arc, 164 N.J. Super. 226, 395 A.2d 1270, 1273-77 (Chan. Div. 1978), modified, 175 N.J. Super. 598, 421 A.2d 602 (App. Div. 1980), certif. den., ___ N.J. ___, ___ A.2d. ___ (1980).

ported in a life of leisure with funds from a trust created for Ms. Johnson's benefit by her father many years ago.

Among these expenditures were acquisitions of real property in New Jersey and elsewhere including - significantly for this proceeding - a condominimum known as the U.N. apartment purchased by Ms. Johnson with her funds prior to her marriage to Dr. D'Arc. Title to this condominium was placed in Dr. D'Arc's name, and the parties occupied it during the three and a half years of marriage. They separated in February 1976. Dr. D'Arc resumed his practice of psychiatry and at the time of the trial was earning $40,000 as an employee of the State of New York with additional income accruing from a private practice.

At trial, Dr. D'Arc argued for a sizable equitable distribution of property to him from Ms. Johnson despite the fact that the Doctor had contributed nothing in a financial way to the acquisition of the marital property. Primarily, he contends that he was entitled to a share of the money he helped his wife spend during the mar-

riage. The record below demonstrated that the Doctor had been fully supported by his wife during this brief marriage. Further, after separation he appropriated to himself nearly $260,000 in assets none of which have been returned despite outstanding court orders. He stood below and still stands in continuing contempt of the courts of the State of New Jersey.

Two further matters merit consideration. First, there is the written agreement between the parties upon which the husband relies. Second, the trial court found as a fact that, after his marriage deteriorated, Dr. D'Arc plotted to murder Ms. Johnson with the obvious purpose of obtaining a substantial share of her estate. On the matter of the agreement, the record shows that in February, 1976, the parties had come to a parting of the ways. On a morning drive from their New York apartment to their residence in Far Hills, New Jersey, Dr. D'Arc discussed with his wife a basis for separation. After this discussion, the husband typed a one page agreement at the Far Hills home, obtained his wife's signature and affixed his own. This agreement (Exhibit D-1)

appears in its entirety as the Appendix to this Brief. The literal and very liberal terms of this one page document purports to provide Dr. D'Arc with a "tax-free" monthly income of $10,000 at an annual cost to Ms. Johnson in excess of $400,000. Neither party consulted counsel in connection with this arrangement, and, after making payments for March and April of 1976, Ms. Johnson terminated the arrangement on the advice of her lawyer.

More dramatic was the murder plot which dominated the testimony in this lengthy trial. On the evidence, including taped telephone conversations between Dr. Victor D'Arc and one Theodore Fino, the trial judge pronounced himself "satisfied that Ms. Johnson has proven by a preponderance of the evidence that her husband, Dr. D'Arc, was the person on the taped telephone recordings who offered Fino $50,000 to murder her." P.A. 23; 395 A.2d at 1276. On the basis of this finding, the New Jersey courts denied Dr. D'Arc alimony and ordered equitable distribution of all of the marital property, including the U.N. apartment, to Ms. Johnson. Dr. D'Arc seeks certiorari on asserted constitutional grounds.

These alleged bases for further review are briefly discussed in the argument which follows.

REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

A. The Decision Below Rests On An Adequate, Independent State Ground.

While the Appellate Division of the Superior Court of New Jersey decided this case on the merits on October 10, 1980, and the Supreme Court of New Jersey subsequently denied certification, D'Arc v. D'Arc, 175 N.J. Super. 598, 421 A.2d 602 (App. Div. 1980), certif. den. _____ N.J. _____, ___ A.2d ___ (1980), the Appellate Division noted a separate ground for dismissing the husband's appeal, to wit, his continuing and persisting contempt of the judgments entered below. See the Appellate Division opinion at P.A. 35a-36a and authorities cited. In fact, the Appellate Division considered the merits of the husband's appeal only because its "determination of the [wife's] cross-appeal results in disposition of plaintiff's appeal." P.A. 34; 421 A.2d supra, at 603. Obviously, the New Jersey holding adverse to the petitioner rests on an independent nonconstitu-

tional ground, i.e., a continuing contempt which itself justified dismissing his appeal by reason of a clear violation of New Jersey practice.

B. None Of The Issues Raised By The Petitioner Present Either Constitutional Issues Or Substantial Federal Questions Requiring The Intervention Of The United States Supreme Court.

First, the husband contends that the courts below, which refused to enforce an agreement between husband and wife, in some way violated his constitutional rights on two theses. On the one hand, he argues that refusal to enforce this agreement violates the sanctity of contracts contrary to Article 1, Section 10, of the United States Constitution. Wholly aside from the fact that this argument was never advanced in the trial court, it is utterly lacking in merit. Courts of equity have historically reviewed agreements between husband and wife to determine their fairness. Herr, 11 N.J. Practice, Marriage, Divorce & Separation Sec. 801 (1950). The matter is most recently discussed in Carlsen v. Carlsen, 72 N.J. 363, 371 A.2d 8, 12 (1977); see also Justice Pashman's extensive discussion of the equitable power to modify separation agreements in Lepis

v. Lepis, 83 N.J. 32, 416 A.2d 45, 48-50 (1980).

Further, the husband reiterates an argument pursued in the state courts to the effect that a wife is no longer a "preferred suitor" entitled to special protection in light of the liberation of women. As to the former practice in New Jersey, see e.g., Wolff v. Wolff, 134 N.J. Eq. 8, 34 A.2d 150 (Chan. 1943). On this particular issue, the wife advanced and the New Jersey courts accepted a contention that the modern approach to agreements between husband and wife should not deny the wife protection because she no longer has a "preferred" status but rather should accord like protection to both husband and wife in view of the confidential relationship between these parties.

While the husband argues that the emancipation of women has ended any presumption of undue influence or improper conduct on the part of the husband, the fact remains that, when a husband and wife are living together and make a contract, they occupy a confidential relationship. This relationship runs to each other, and the rule, as accepted by the New Jersey courts,

is that, at least any party granting greater benefits to the other, whether it be husband or wife, should have independent advice, and second, that a court should approve such agreements as fair and equitable. The courts below followed this doctrine. It is sound law.

Specifically, on the point, the trial judge, The Honorable Michael R. Imbriani, speaking for the Chancery Division of the New Jersey Superior Court, found that it would be "unfair, unjust and inequitable to enforce the February 22, 1976 agreement." P.A. 26a; 395 A.2d, supra, at 1271. Judge Imbriani's conclusion rested upon a finding that the agreement was not clear, particularly concerning the issue of what the parties thought to be fair and equitable as alimony should there be a divorce, a course of action neither apparently contemplated at the time the agreement was prepared. Further, the court below accepted the contention that it was unfair to have the wife sign this agreement without the legal advice she had been accustomed to seek with reference to all business problems. Nothing in the opinion expressly or by implication gives any "preferred"

status to any suitor, husband or wife. The fact that many New Jersey cases are couched in terms of a husband's influence over a wife bespeaks the facts and mores of the past rather than any decision of the present. In point of fact, the New Jersey Supreme Court in Carlsen v. Carlsen, supra, held, long after the emancipation of women in this State, that any contract between husband and wife is enforceable if a court finds it "to be fair and equitable." 371 A.2d supra, at 12.

Second, the husband contends that New Jersey's equitable distribution of the parties' property following termination of his marriage is unconstitutional as a denial of substantive due process as applied to property previously acquired by him, i.e., the U.N. apartment. Nowhere in the husband's petition does he reveal what the record below clearly shows: title to the U.N. apartment was acquired by Dr. D'Arc from Ms. Johnson who paid for the condominium while they were living together for a year prior to the marriage. The parties then resided as husband and wife in that apartment throughout the marriage.

N.J.S.A. 2A:34-23 vests New Jersey courts

with the power, upon the granting of a divorce, "to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage." In this case, the New Jersey courts have held that this language covers real estate purchased by a wife with her funds and placed in her husband's name prior to marriage. No citation of authority, of course, is required to demonstrate that this holding as to the construction of New Jersey law is binding upon the United States Supreme Court. Nor is it difficult to see the rationale which suggests that, where parties, intending marriage, acquire a residence, place it in the name of one or the other and then reside in it, such property becomes an asset "legally and beneficially acquired by them" during the marriage. In any case, this construction by the New Jersey Supreme Court in no way violates the Fourteenth Amendment to the Constitution of the United States - it represents at most an arguable contention as to the construction of a New Jersey statute as to which the New Jersey courts are the final authority.

* * *

Further, the husband complains of New Jersey's decision to deny him any equitable distribution at all on the ground that he sought to murder his wife. He argues that this application fails to recognize an asserted New Jersey doctrine that "marital fault" has no bearing when it comes to equitable distribution. This argument obviously fails to raise even a colorable issue under the Constitution of the United States. Surely, a state rule which denies equitable distribution to a husband who tries to murder his wife does not violate the Federal Constitution. Indeed, a contrary rule would violate common sense and perhaps the Constitution as well.

Briefly stated, the husband concedes, as he must, that, if he had successfully murdered his wife, he would have been barred from any share in her estate. E.G., Small v. Rockfeld, 66 N.J. 231, 330 A.2d 335 (1974). However, he goes on to contend that an unsuccessful plot to murder his wife constitutes extreme cruelty under New Jersey divorce law and hence "marital fault." Therefore, the husband continues, since such

"fault" must be excluded in determining "equitable" distribution, his attempt to murder his wife must be disregarded by a court of equity. To state the proposition reveals its absurdity. As the trial judge declared: "The obligation of this Court is to implement the purpose of law, which is to do justice, and not to mechanically apply established principles of law, even when they compel an absurd result. To ignore the facts of this case would be tantamount to permitting Dr. D'Arc to obtain by indirection that which he failed to obtain by a direct attack on the life of his spouse." 395 A.2d supra, at 1278. This holding of the New Jersey court simply raises no constitutional question.

Third, the husband contends that the admission in evidence of taped recordings of his telephone conversations with Theodore Fino violated a number of statutes, including 18 U.S.C. Sec. 2510 et seq., dealing with wire tap and the interception of telephone communications. First, as the New Jersey Appellate Division pointed out in its brief opinion, there is absolutely no evidence that this tape was obtained by way of an

interception or wire tap so as to bring into play the cited statute. Rather, the conversation was recorded by one of the participants, Theodore Fino. Thus the cited statute has no relevance - there was no unlawful interception under the specific language of 18 U.S.C. Sec. 2511 (2)(d).

But the husband further complains that the tape should not be admissible because no proper foundation was laid as to its authenticity or as to its preparation by Theodore Fino. Fino had refused to testify before a Grand Jury in New York investigating this very matter instead choosing to serve a prison term for contempt. Under these circumstances, which the court below found, incidentally, tantamount to Fino's unavailability, the wife offered the testimony of the persons who whom Fino had delivered the tape and described the manner of its recording.

Moreover, the husband's identity on the tape was authenticated by a number of witnesses who recognized his voice as well as by much internal evidence of the identity of the speaker. In any event, the husband has repeatedly argued and argues here that this evidence should not

have been admitted on the basis of hearsay statements concerning Fino's recording of the conversations. The New Jersey courts under **New Jersey Evidence Rule 8** held that a trial judge on a preliminary inquiry concerning admissibility may rest his findings upon hearsay relying upon prior New Jersey decisions on the precise point. This concept that hearsay and other "inadmissible" evidence may be admitted to authenticate or to decide preliminary matters is well established. E.g., Federal Rule of Evidence 104(a); McCormick on Evidence 122, n.91 (1972). Moreover, such questions are clearly matters of state law which in no way raise constitutional issues.

CONCLUSION

There are no substantial constitutional or federal questions involved in this matter. The decision rests on sound New Jersey Law. The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

By s/R.H.T.
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Dated: April 7, 1981

Appendix

APPENDIX A

February 22, 1976

We the undersigned Mary Lea Johnson D'Arc and Victor D'Arc agree to separate and live apart from each other.

We agree to release each other from all claims against each other except for the following conditions:

Mary Lea agrees to give Victor D'Arc a sum which after deducting income taxes will give him tax free alimony of $10,000 per month indefinitely. Victor agrees to sign a joint tax return.

Victor will not make Mary Lea responsible for any debts nor will Mary Lea make Victor responsible for any debts.

Mary Lea agrees to make all payments that are necessary on any joint property they have. Mary Lea will continue to live in Victor's apartment at 860 United Nations Plaza as long as she makes the necessary payments for maintenance and other assessments.

Whatever property Victor has in his name will remain in his, and whatever property Mary Lea has in her name will remain in hers, and whatever property they have in their joint names

that property will continue to remain that way.

Mary Lea agrees that in the event that Victor should die she will assume responsibility for the welfare of two daughters Karen Helen D'Arc and Pamela Stephanie D'Arc in that she will give them the sum of $25,000 each per year indefinitely. In addition she agrees to pay all of their educational expenses while they are in school.

Mary Lea acknowledges this to be a fair and just arrangement in recognition of the fact that Victor gave up his professional career and earnings to be able to devote himself to her business interests and that he contributed all of his energies to their marriage and family affairs.

If Victor and Mary Lea should become divorced they agree that this agreement shall be part of the divorce decree.

Victor agrees that if in his lifetime he should acquire sufficient capital in his personal estate to produce the same amount of income then Mary Lea will be released from all financial obligations to him.

APPENDIX A

Signed February 22, 1976

s/M.L.J.D

Mary Lea Johnson D'Arc

s/V.D.

Victor D'Arc

DEFENDANT'S
EXHIBIT

D-1 Ev

2-21-78